United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7669

To be argued by
VICTOR A. KOVNER

In The

United States Court of Appeals

For The Second Circuit

WEITNAUER TRADING COMPANY, LTD.,

Plaintiff-Judgment Creditor-Appellee,

- against -

MORTON L. ANNIS,

Defendant-Judgment Debtor-Appellant.

Appeal from an Order of the United States District Court for the Southern District of New York

BRIEF FOR PLAINTIFF-JUDGMENT CREDITOR-APPELLEE

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

WEITNAUER TRADING COMPANY LTD., Plaintiff-Judgment Creditor-Appellee, -against- MORTON L. ANNIS, Defendant-Judgment Debtor-Appellant.	Docket No. 75-7669

BRIEF FOR PLAINTIFF-JUDGMENT CREDITOR-APPELLEE

Preliminary Statement

This brief is submitted on behalf of Weitnauer Trading Company, Ltd. ("Weitnauer"), the plaintiff-judgment creditor below and the appellee on this appeal taken by Morton L. Annis ("Annis"), the defendant-judgment debtor. Annis appeals from so much of an order of the District Court for the Southern District, filed and entered on October 30, 1975 (the "Order"), which directs Annis to make

certain monthly installment payments over a five-year period to satisfy a judgment of $182,065.44 plus interest. The Order was settled on 10 days notice pursuant to a memorandum and opinion of the Honorable Robert L. Carter, District Judge, dated October 1, 1975 and entered October 6, 1975.

Statement of Issues on Appeal

1. Did the record below contain sufficient evidence to support the installment payment order of $3,000 plus interest per month out of all monies received, to be received or which he is entitled to receive? The court below found that it did (A 317 - 327*); Weitnauer submits that the record fully supports and warrants such order.

2. Did federal garnishment law, 15 USC §§ 1671-1677, limit the amount of installment payments ordered pursuant to New York Civil Practice Law and Rules § 5226? The court below found it did not (A 327) and Weitnauer

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* References to pages of the Appendix are designated (A).

contends that holding was proper as a matter of law.

3. Did the District Court abuse its discretion in ordering that the installment payments commence as of May 1, 1975, the return date of the motion? The record below supports the ordering of payments as of such date (A 333 - A 334) and Weitnauer contends that such exercise of discretion was not improper as a matter of law.

Statement of the Facts and Prior Proceedings

Weitnauer commenced this action on March 1, 1971 based upon Annis' written personal guarantee of certain corporate obligations. After a trial at which Annis testified, Judge Robert L. Carter rendered an opinion dated June 12, 1974 in Weitnauer's favor. On June 19, 1974 a judgment in the amount of $182,065.44 plus interest was entered; it was entered in modified form for the same sum on September 11, 1974. The judgment was unanimously affirmed by this Court on May 28, 1975 in an opinion reported at 516 F.2d 878. As demonstrated by the Docket Entries (A 2-4), the post-

judgment proceedings have been extensive*. No part of the judgment has been paid or otherwise satisfied.

This appeal concerns only that portion of the Order which directs Annis to make monthly installment payments of $3,000 of principal, plus prorated interest of $1,253.93 per month to satisfy the judgment over a five-year period commencing May 1, 1975. The appeal does not challenge the manner in which the interest portion of the

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* Although the Docket Entries in the Appendix conclude with December 9, 1975, Weitnauer respectfully requests that the Court take notice of the record herein subsequent to such date, including Annis' six applications for interim relief (three to this Court) pending a decision on this appeal. By order of December 11, 1975, this Court granted Annis' request for a conditional stay of the Order. That stay, however, is not in effect since Annis failed to comply with the condition of posting a supersedeas bond. Accordingly, Annis, who has not made any of the installment payments now past due, is in default of the Order and an order of the District Court holding him in contempt was signed and entered December 18, 1975. The contempt order has been delivered to the U.S. Marshal for enforcement. Pursuant to the suggestion of the Clerk of this Court, the parties stipulated on January 6, 1976 that Annis' appeal from the contempt order would be argued together with this appeal.

monthly payments was determined (Annis Brief at 2).*

The installment payments were ordered pursuant to an extensive opinion of Judge Robert L. Carter (A 307-328) in response to Weitnauer's cross-motion of May 1, 1975 seeking installment payments of $5,000 per month, pursuant to Rule 69 (a) of the Federal Rules of Civil Procedure and § 5226 of the New York Civil Practice Law and Rules.

The record on the cross motion is included in full in the Appendix and contains, inter alia, the following: (1) the notice of cross-motion (A 50), (2) the affidavit of Victor A. Kovner in support thereof, dated May 1, 1975 (A 52-60), with exhibits A-F (A 61-71), (3) the transcripts of two depositions of Annis taken during supplementary proceedings on January 31, 1975 (A 87-202) and April 4, 1975 (A 203-306)** submitted with moving affidavit,

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* References to pages in appellant's brief are designated (Annis Brief at)

** Counsel for Weitnauer has agreed to advance the cost of reproducing the transcripts of Annis' depositions in the Appendix and requests that it be awarded such costs pursuant to Rule 30 (b) of the F.R.A.P.

(4) the opposing affidavit of Leslie D. Corwin, dated May 5, 1975 (A 72-79), and (5) the reply affidavit of Victor A. Kovner, dated May 7, 1975 (A 80-86). The court below also had before it the affidavit of William P. Laino (A 43-45), attorney for General Cigar Co., Inc. ("General Cigar") describing General Cigar's holding of sums due Annis pursuant to a contract with him, annexed as Exhibit "A" to the Laino affidavit (A 46-49).

Although there is no transcript of the oral argument before Judge Carter on the cross-motion, it should be clear to the Court that no request for a trial or a hearing on oral testimony ever was made by Annis or on his behalf. Moreover, no request was made for additional time to cull evidence in opposition to the cross-motion prior to its submission or to file supplemental papers or otherwise provide the District Court with further evidence on Annis' ability to make payments after submission of the motion on May 7, 1975. Even in the affidavit filed in opposition to the counter-order submitted by Weitnauer, no claim of insufficient evidence was raised (A 339-343). It was not until December 9, 1975,

after Weitnauer commenced contempt proceedings to enforce the Order, that Annis belatedly contended insufficiency of the evidence. Even then, no new or additional facts were offered.*

Summary of Argument

Of the points of argument advanced by Annis for modification of the Order, those relating to the sufficiency of evidence, the alleged need for a hearing or trial and the issue of the income which Annis was entitled to receive (Points I and IV of Annis Brief), are fully rebutted by the extensive evidence set forth in the record which will be discussed in Point I of Weitnauer's Argument below. Point II will show that the District Court did not err as a matter of law in holding the federal garnishment limitations inapplicable. Point III will show that the District Court did not abuse its discretion in ordering the installment payments to begin as of May 1, 1975.

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* On December 9, 1975 Annis' motion in the District Court to stay and/or modify the Order was denied. As may be confirmed by the record on the appeal from the contempt order, those motion papers do not advance any facts, new or different from those contained in this record on appeal.

POINT I

THE RECORD CONTAINS ABUNDANT EVIDENCE TO SUPPORT THE INSTALLMENT PAYMENT ORDER.

A. CPLR § 5226 establishes the procedures and standards applicable to the issuance of installment payment orders, all of which were followed by the court below.

The parties are in full agreement that pursuant to Rule 69 (a) of the Federal Rules of Civil Procedure, the practice and procedure of the New York Civil Practice Law & Rules, and particularly § 5226 thereof, governs the issuance of an installment payment order. (Annis Brief at 9) There can be no question that in rendering its opinion on the cross motion for such payments, the court below relied upon CPLR § 5226 and the cases decided thereunder (A 317).

§ 5226 sets forth the conditions under which installment payments should be ordered:

> "[W]here it is shown that the judgment debtor is receiving or will receive money from any source, or is attempting to impede the judgment creditor by rendering services without adequate compensation, the Court shall order that the judgment debtor make specified installment payments to the judgment creditor."

Contrary to Annis' contention on this appeal (Annis Brief at 10), there can be no question that both of these conditions - although they are stated in the alternative - were found to be present by the District Court (A 317-318). Moreover, there is ample evidence in the record to sustain these findings as to both grounds. Unlike the facts in Uni-Serv Corporation v. Linker, 62 Misc. 2d. 861, 311 N.Y.S. 2d 726 (Civ.Ct.N.Y. 1970), where "no proof of income or assets" or no proof "that the debtor was rendering services without adequate compensation" had ever been adduced, the record here is replete with evidence of both. Annis' "income" from General Cigar is discussed in sub-section "B"; his secreting and diverting of the Master Packaging, Inc. ("Master Packaging") income to which he is entitled is covered in sub-section "C" below.

After determining the existence of income, under § 5226, the Court is obligated to consider various factors set forth in the section before specifying the periodic payments. That portion of the section provides:

> "In fixing the amount of the payments, the court shall take into consideration the reasonable requirements of the judgment debtor and his dependents, any payments required to be made by him or deducted from the money he would otherwise receive in satisfaction of other judgments and wage assignments, the amount due on the judgment, and the amount being or to be received, or, if the judgment debtor is attempting to impede the judgment creditor by rendering services without adequate compensation, the reasonable value of the services rendered."

There can be no question that the District Court was fully cognizant of its obligation to take into consideration each of these factors, the opinion below sets them forth explicitly and discusses each in conjunction with the record (A 319-326).

Sub-section "D" below is addressed to the substance of the record as to Annis' requirements and his ability to meet them.

B. There was uncontroverted proof that Annis has continuing income from General Cigar.

The record establishes beyond question Annis' income from General Cigar in the amount of $25,000 per annum or $2,083.33 per month. Not only is Annis' receipt

of this income described in Weitnauer's moving papers, the agreement between Annis and General Cigar is annexed as an exhibit to the affidavit of William P. Laino, attorney for General Cigar, in which Mr. Laino describes Annis' receipt of monies from General Cigar (A 43-49). Annis' right to receive these sums and his actual and continuing receipt of them never has been denied. To the contrary, those funds were the subject of Annis' motions to vacate the restraining notice (A 5-13) and to modify the execution (A 20-28). They are also discussed in the affidavit of Leslie D. Corwin opposing the cross motion for an installment payment order (A-74)*.

C. The record establishes that Annis is entitled to income from Master Packaging and the Order properly took into consideration both the amount of income and Annis' diversion of it.

After evaluating the evidence, the court below concluded that "Annis has diverted or otherwise secreted his

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* In addition, Annis' attorney acknowledges further receipt of General Cigar funds in affidavits and exhibits in relation to Weitnauer's motion to hold Annis in contempt. See the affidavits of Norton I. Katz and Leslie D. Corwin of December 3, 1975, docketed on December 10, 1975.

consulting compensation of $35,000 per year from Master Packaging, a company of which he has been chairman of the board since 1973, in an effort to frustrate collection on this judgment." (A 318)

Although the actual agreement between Annis and Master Packaging was not before the District Court, evidence as to its terms, including the monies to be paid to Annis was extensive. In fact, Annis is relying on certain terms of that agreement in connection with this appeal (Annis Brief at 11, A 346). The lower court's finding that Annis' compensation from that agreement was being diverted was based on Annis' own testimony in depositions taken during supplementary proceedings (A 318-319).

In the first deposition taken January 31, 1975, Annis testified that he was to get $35,000 per annum from Master Packaging pursuant to an agreement still in effect (A 128-129). In "corrections" to that deposition transcript, Annis stated that his contract with Master Packaging was assigned to Astro Metric (A 66). In the January deposition Annis also testified that he sold his interest in Astro Metric for $500 to his secretary Rose Riffe (A 91-92, 114).

In the second deposition taken April 4, 1975, Annis again testified about his relationship with and income from Master Packaging and stated that certain changes in his consulting relationship with the company were not yet completed. As to those changes he testified:

> "Well, because of the state of my health I thought it would be better for me to make some changes and have money paid not to me as an individual so much and to put it in with a whole new concept, which I have not yet really developed as yet." (A 300)

Annis then testified that, although he was not receiving salary under that consulting agreement with Master Packaging, he had been and still was receiving money from the company as commissions for sales work (A 301-302).*

Weitnauer respectfully submits that this line of testimony fully supports the District Court's finding that Annis was diverting or secreting income from Master Packaging in derogation of Weitnauer's efforts to collect on the judgment. Hence, there can be no question that the Order

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* The agreement provides for such commissions, separate and apart from the per annum compensation which is payable bi-monthly (A 347).

properly directed the installment payments out of "all monies received, to be received or which he is entitled to receive." (A 331)

Annis' argument in Point IV of his brief (Annis Brief at 22-23) speciously contends that this wording of the Order fails to bring it within the requirements of F.E. Compton & Co. v. Williams, 290 N.Y.S. 984 (4th Dept. 1936). Since it is clear that Annis has access and a right to the Master Packaging income and may not receive it because of his own nefarious schemes, any order that failed to protect the judgment creditor in this respect would be deficient. Equally specious is the hypothetical argument that the bankruptcy of General Cigar, for example, would leave him without funds notwithstanding his right to receive them. In such event, the obvious and proper course to follow would be a motion to modify the installment payment order on the basis of new facts and circumstances. 6 Weinstein, Korn & Miller ¶ 5226.22, pp. 52-414-415 and CPLR § 5240.

Similarly, a motion to modify is the proper remedy if and when Annis' right to money from Master Packaging leases.

In appellant's brief to this Court much is made of the fact that, by its terms, the written agreement between Annis and Master Packaging does not necessarily run for the full five-year period for which the installment payments ordered were calculated. By its terms, it does run at least until July 2, 1978 and possibly longer (A 346). Certainly, the possibility that Annis' situation may change between the date of the Order and the ultimate satisfaction of the judgment does not provide grounds for an appeal from the amount of payments ordered on the basis of present circumstances. Indeed, should Weitnauer learn of additional sources of funds from which Annis can meet his needs, it, too, would seek to have the Order modified. (6 Weinstein, Korn & Miller, supra) In no way does a possible or even anticipated change in the future establish an abuse of discretion in fixing the payments.

Contrary, then, to the astounding statements in appellant's brief that there was no proof in the record as to Annis earnings at the time of the motion (Annis Brief at 10), the record contains conclusive documentation of the

$25,000 per annum from General Cigar and a right to $35,000 per annum from Master Packaging.

Having found that Annis was receiving or entitled to be receiving money, the court below was obligated to order installment payments, 6 Weinstein, Korn & Miller ¶ 5226.12, pp. 2-405-406.

D. The findings of the District Court as to Annis' reasonable requirements and his ability to meet them are fully substantiated by the record.

Although § 5226 provides that "the court shall order that the judgment debtor make specified installment payments" once it has been determined that he is receiving money from any source, the amount and frequency of the payments is discretionary. In exercising that discretion the court must "take into consideration the reasonable requirements of the judgment debtor and his dependents," including payments required to be made in satisfaction of other judgments.

The District Court easily concluded that there were no other outstanding judgments against Annis (A 319) and that he had no obligations to dependents, his children

being adults and his wife being independently wealthy (A 320). No evidence to the contrary in either of these findings has been offered by Annis; indeed his own deposition testimony fully supports both. (See e.g., A 187 with respect to the absence of other judgments and A 129, 163 and 181 with respect to the independence of Annis' wife and children.)

The question then becomes the extent of Annis' own "reasonable requirements." "Although the act charges the court with the obligation to give due regard to the reasonable requirements of the judgment debtor's family, the burden is on the debtor to come forward with details concerning expenditures required to support his family." Industrial Bank of Commerce v. Kelly, 215 N.Y.S. 2d 644, 645 (Sup. Ct. Nassau Co. 1961).

Annis' Brief relies upon a statement in the affidavit of Leslie D. Corwin of May 5, 1975 in opposition to the cross motion for installment payments in which Mr. Corwin refers to Annis' medical needs and expenses (Annis Brief at 13). No other particularized needs or requirements

were alleged or even suggested below.* And there can be no question that the court below did consider Annis' medical requirements since specific reference is made to them in the opinion and, similarly, it took due note of the range of his over-all monthly expenditures (A 320). Those expenditures of $5,000 - $10,000 are also documented by the record (A 293).

In assessing a judgment debtor's reasonable requirements and, correspondingly, his ability to meet them, assets as well as periodic income are properly considered. In Uni-Serv Corporation v. Linker, supra at 729 (a case cited in Annis Brief at 10), the court vacated an installment payment order because "no proof of income or assets" was adduced. In the case of McDonnell v. Birrell, 321 F.2d 946 (2nd Cir. 1963) this Court affirmed and upheld in all respects an installment payment order issued by the District Court. In so doing Chief Judge Lumbard, writing for a unanimous panel, found:

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* The motion to modify the Order made on December 9, 1975, the return date of the motion to hold Annis in contempt also fails to allege any other particularized needs and fails to provide any documentation on the medical expenses that was not already before the Court on the motion.

> "The record provides abundant evidence to support a monthly installment order of $500. Simon's financial statement showing a net worth of $184,503.14, and evidence of the manner in which he and his family live, and his business activities, afford ample proof that he is in a position to comply with the order and still meet without difficulty 'the reasonable requirements of the judgment debtor and his family,' . . ." (321 F.2d at 948)

Similarly, even though certain types of income may be exempt as the source of installment payments, even such exempt income "may be considered in determining what portion of the judgment debtor's income from other sources may be applied to the judgment." 6 Weinstein, Kern & Miller, ¶ 5226.17, p. 52-411.

There can be no question that Annis' assets, general net worth and life style are highly probative of his ability to meet his reasonable requirements and make periodic payments on the judgment out of monies received. In examining his net worth, the District Court began with the most recent financial statement of the judgment debtor prepared by Annis himself. This statement showing a net

worth of $1,977,000 was annexed as Exhibit "A" to the moving affidavit of Victor A. Kovner of May 1, 1975 (A 61).*

Nothing in that financial statement was questioned or refuted by the opposing papers filed. However in lieu of accepting it as an accurate and current statement as of the date of the motion (or the decision), the District Court went to great lengths to assess it in light of Annis' own deposition testimony given in January and April 1975. Indeed, the Court, sua sponte, discounted many of the substantial valuations on Annis' own financial statement and devoted four pages of its opinion to this task (A 322-325). Much to Annis' benefit, the District Court assessed his net worth to be in the range of $700,000 - 800,000, a reduction by more than half of the $1,977,000 reported by Annis himself the previous May.

Although Annis would have this Court believe that the District Court proceeded on baseless assumptions, the

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* This statement was the most recent of four financial statements found in the record (A 61-65), all showing a net worth well in excess of $1,000,000.

record - as documented in the opinion of Judge Carter - fully supports the conclusions found. While Judge Carter properly disclaimed precision as to the figures, the record absolutely abounds with evidence to support his fundamental conclusion that with a substantial net worth, the aggregate payments from General Cigar and Master Packaging could well sustain Annis' reasonable requirements and the installment payments ordered.

Weitnauer does not dispute appellant's contention that the judgment debtor should not be left stripped of everything but the bare necessities to maintain a minimum standard of living, but it does believe that in the context of Annis' overall and clearly established wealth, such a suggestion is disingenuous (Annis Brief at 14). As stated in 6 Weinstein, Korn & Miller ¶ 5226.13, pp. 52-407, the court need not respect every luxury. Indeed, the New York courts have exercised discretion in determining that certain customary expenditures are unnecessary.

In Yamamoto v. Costello, 73 Misc. 2d 592, 342 N.Y.S. 2d 33 (Sup. Ct. Nassau Co. 1973), the court found that:

> "The expenses claimed for dating, credit card expense for business entertaining, membership in the New York Athletic Club, a golf club, and the Wine and Food Society may be perfectly acceptable undertakings, but in this context are clearly not living necessaries falling in priority ahead of prompt, albeit gradual payment of the outstanding judgment." (342 N.Y.S. 2d at 39)

Based on Annis' substantial wealth and high life style, it would seem that, at worst, the installment payments ordered would require him to cut back on some luxuries which can hardly be deemed an abuse of judicial discretion in view of the size of Weitnauer's judgment.

E. There was no request or need for a trial or hearing upon oral testimony.

While Weitnauer does not dispute Annis' contention that a court may itself or by jury try (or refer to a magistrate to hear and report) upon oral testimony any disputed facts about the judgment debtor's means and obligations, clearly a hearing on oral testimony is not mandatory and here there was no need for one. Apart from the fact that

Annis never requested the opportunity to present oral testimony (or, indeed, any additional evidence), there were no issues of disputed fact before the court below.

Moreover, an examination of the opinion of the District Court demonstrates that, in addition to the affidavits, exhibits, and oral argument by the attorneys for both parties, as well as the attorneys for General Cigar, Annis' own testimony received the Court's careful study and was itself the primary basis for the determinations made. Hence, this is hardly a situation where the court made factual findings and conclusions on the basis of attorneys' affidavits as appellant would have this Court believe (Annis Brief at 10).

To the extent appellant might suggest that the deposition transcripts are less probative than live testimony at which the witness's demeanor, etc. can be observed, it should not be forgotten that it was appellant's counsel who chose not to offer the oral testimony of Annis, who had testified at the original trial. Clearly, there is no basis for Annis' argument that the absence of a trial was reversable

error or an abuse of discretion or, indeed, in any way prejudicial to his rights.

POINT II

FEDERAL GARNISHMENT LIMITATIONS DO NOT APPLY TO THE INSTALLMENT PAYMENT ORDER.

Weitnauer does not dispute Annis' lengthy argument that the federal garnishment limitations in 15 USC §§ 1671-1677 preempt state law garnishment provisions less protective of a judgment debtor (Annis brief at 16-18). Weitnauer does, however, vigorously dispute Annis' conclusion that the installment payment order is a "garnishment" under any applicable law. The Court below specifically held that an installment payment order is not a "garnishment," and that holding is fully supported by all applicable law, including the Consumer Credit Protection Act itself (15 USC §§ 1671-1677), the cases decided thereunder as well as New York law, including Article 52 of the CPLR and § 46 of the Personal Property Law (A 327).

Turning first to the language of the federal statute, "garnishment" is defined in § 1672(c) as "any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt." Notwithstanding Annis' tortured suggestion that the installment payment order requires Annis to "withhold" his own earnings, it is clear - again within the language of the Act - that it was designed to cover a situation where a third party - most often an employer - is required to "withhold" earnings otherwise payable to the judgment debtor.

Section 1674 is conclusive in this regard. Entitled "Restriction on discharge from employment by reason of garnishment" it provides that: "No employer may discharge any employee by reason of the fact that his earnings have been subjected to garnishment for any one indebtedness." This language and the cases decided under the section show that the traditional and common meaning of the word "garnishment," as a withholding by a third party,

lies behind the Act. See Brennan v. General Telephone Co. of Florida, 488 F.2d 157 (5th Cir. 1973) and Simpson v. Sperry Rand Corporation, 488 F.2d 450 (5th Cir. 1973). Certainly, none of the provisions of the Ohio Code which were found to be preempted by the Consumer Credit Protection Act in Hodgson v. Cleveland Municipal Court, 326 F. Supp. 419 (N.D. Ohio 1973) resembled New York's installment payment provision, CPLR §5226, in any way.* See also, Hodgson v. Hamilton Municipal Court, 349 F. Supp. 1125 (S.D. Ohio 1972).

Contrary to Annis' suggestion, the case of Hodgson v. Christopher, 365 F. Supp. 583 (D.N.D. 1973) does not expand the meaning of "garnishment" beyond the withholding by a third party - an employer. The court

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*Also significant is the court's discussion of the form of notice to the judgment debtor required by the Ohio statute: "He [the judgment debtor] is told that if he does not pay within 15 days the creditor will go to court, and ask his employer to withhold money from his earnings and pay it to the court to satisfy the debt. It says, 'this is called garnishment.'" (326 F. Supp. at 424-5, emphasis supplied). Another Ohio form discussed by the court is entitled "Answer of Employer (Garnishee)."

t..er: found that:

> "[W]henever they [the debtor's earnings] remain in the possession of the employer, they are 'withheld' within the context of the Act. Not only is this in keeping with the spirit of the CCPA, but it is logical. Clearly, if wages have not been turned over to the employee, they are being withheld by the employer." (365 F. Supp. at 587)

Annis' reliance on In re Cedor, 337 F. Supp. 1103 (N.D. Cal. 1972) aff'd, 470 F.2d 996 (9th Cir. 1972) cert. denied, 411 U.S. 973 (1973) is equally misplaced. Not only is the factual setting of that case wholly unrelated to an installment payment order, but the decision is of doubtful validity. On facts virtually identical to those in Cedor, this Court specifically disagreed with the Cedor holding that an order to a bankrupt to turn over an income tax refund to the trustee in bankruptcy was a "garnishment" since the refund was traceable to "earnings" and refused to follow it in In re Kokoszka, 479 F.2d 900 (2d Cir. 1973). Although certiorari was denied in Cedor, it was granted in Kokoszka and the decision of this Court was affirmed by

the Supreme Court in Kokoszka v. Belford, 417 U.S. 642 (1974) in an unanimous opinion written by the Chief Justice.

Just as federal law defeats Annis' contention that the Order is subject to a garnishment limitation, so too does the law of New York State. Below, Judge Carter referred to the definition of "garnishment" set forth in McKinney's Personal Property Law § 46 as specifically excluding installment payment orders under CPLR §5226 (A 327). Although Annis suggests that the presence of this definition in the Personal Property Law implies that for other purposes a §5226 is a garnishment, the statutory scheme on the enforcement of judgments in Article 52 of the CPLR belies such a contention. One of the principal purposes of § 5226 is the situation where the judgment debtor can afford to pay more than the statutory limit on income executions. Yamamoto v. Costello, 73 Misc. 2d 542, 342 N.Y.S.2d 33, 39 (Sup. Ct. Nassau Co.).

As far as the policy of the Consumer Credit Protection Act is concerned, its purpose is set forth in

15 USC § 1671 and discussed in Hodgson v. Cleveland Municipal Court, 326 F. Supp. 419, 429-430 (N.D. Ohio 1971). Clearly the Act was designed to protect weekly wage earners - plant workers, office workers, not men of substantial means and independent wealth like appellant here. Annis' suggestion that the federal garnishment limitation was intended to protect him from the orderly payment of this substantial judgment is wholly unfounded.

POINT III

THE DISTRICT COURT'S SELECTION OF MAY 1, 1975 AS THE EFFECTIVE DATE OF THE INSTALLMENT PAYMENT ORDER DID NOT CONSTITUTE AN ABUSE OF ITS DISCRETION.

While Weitnauer does not suggest that § 5226 mandates that payments be ordered as of the date of the motion, it respectfully submits that the determination of the initial payment date is discretionary - being akin to a determination of the amount and frequency of payment.

Annis does not point to any authority showing the May 1, 1975 commencement date here to be improper.

To the contrary, Kaufman v. Kaufman, 29 A.D.2d 922, 289 N.Y.S.2d 23 (1st Dept. 1968) held that in that case directing the payments to begin as of the date of institution of the proceedings would impose a burden on that judgment debtor which he could not meet. Here, the court below knew that Annis would be receiving more than enough money immediately from General Cigar to pay the accrued installments and it, therefore, had a sound basis for concluding that, in this case, such a directive would not work a hardship on the judgment debtor nor impose a burden he could not meet (A 333-336).

Annis erroneously contends that in ordering the payments as of May 1, 1975, the District Court disregarded the law of the case. True, the lower court found the earlier restraining notice to General Cigar invalid and the subsequent execution thereby defective, yet the District Court clearly and properly distinguished the payment of installment payments by the judgment debtor from an execution directed to a third party. The direction in the Order that the payments for May through October 1975 be

made from the General Cigar funds was to preclude the judgment debtor from complaining that such payments could not be met and/or that the Order wrongfully directed him to pay installments absolutely rather than out of monies received. In this regard, Annis' position on this appeal is inherently contradictory when his argument in Point II - that the direction of payment from the General Cigar monies is improper - is read together with his argument in Point IV - that the Order was defective by failing to provide that the installments be paid out of income received.

In sum, on this appeal Annis is straining for an argument to have the Order overturned. Perhaps the most preposterous argument of all is Annis' complaint that he was deprived of use of General Cigar funds for over a year. It seems that Annis would have this Court forget that he has secreted and divested income and assets, while Weitnauer's judgment of $182,065.44, outstanding since June 1974, has gone wholly unsatisfied, notwithstanding substantial and costly execution efforts.

CONCLUSION

For the foregoing reasons, the Order of the District Court should be affirmed in every respect.

Respectfully submitted,

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A 202 Affidavit of Personal Service of Papers LUTZ APPELLATE PRINTERS, INC.

UNITED STATES SUPREME COURT
FOR THE SECOND CIRCUIT

WEITNAUER TRADING CO,.
Plaintiff- Judgment Creditor- Appellee,

- against -

MORTON L. ANNIS,
Defendant- Judgment Debtor- Appellent.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, James A. Steele *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 310 W. 146th St., New York, N.Y.

That on the 9th *day of* January *19*76 *at* 99 Park Avenue, New York, New York

deponent served the annexed Brief *upon* RICH KRINSLY POSES KATZ & LIELIENSTEIN

the Attorneys *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,*

Sworn to before me, this 9th *day of* January *19* 76

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

James A. Steele
JAMES A. STEELE

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977